MJC City Development Sdn Bhd v Tribunal For Housing Purchaser Claims & Anor

HIGH COURT (KUCHING) — APPLICATION FOR JUDICIAL REVIEW NO KCH-13JR-4/5 OF 2013
RHODZARIAH BUJANG J
7 OCTOBER 2013

Administrative Law — Remedies — Judicial review — Certiorari — Grounds on which High Court may issue order of certiorari

Civil Procedure — Judicial review — Certiorari — Grounds on which High Court may issue order of certiorari

Contract — Damages — Liquidated and ascertained damages — Whether actual damages need to be proven — No known measure of damages — Inherent real loss incurred — Whether damages not exceeding sum named in liquidated damages clause may be awarded — Contracts Act 1950 s 75

Contract — Sale and purchase of property — Delay in completion — Housing developers — Damages for late delivery — Liquidated and ascertained damages — Sale and purchase agreement in Form H — Whether actual loss not needed to be proven — Contracts Act 1950 s 75 — Housing Developers (Control and Licensing) Regulations 1998 r 11(1)

Land Law — Housing developers — Damages for late delivery — Liquidated and ascertained damages — Sale and purchase agreement in Form H — Whether actual loss not needed to be proven — Contracts Act 1950 s 75 — Housing Developers (Control and Licensing) Regulations 1998 r 11(1)

The tribunal for housing purchaser claims ('the Tribunal') had adjudged that the developer of a condominium complex liable to pay a purchaser of one unit, a Mr Kong, a sum of RM10,514 representing the liquidated ascertained damages for the late completion of the common facilities of the complex. Clause 25(1) of the sale and purchase agreement ('the agreement') stipulated that the common facilities must be completed within 36 months from the date of the said agreement and that for failure to do so, under cl 25(2), the developer must pay liquidated damages at the rate of 10%pa on the amount of purchase price paid to date by the purchaser to the vendor. The developer contended that

the award made was wrong as there was no proof of damage as required by s 75 of the Contracts Act 1950. The developer thus applied for an order of certiorari to quash the decision of the tribunal.

Held, dismissing the application with cost of RM5,000:

(1) Clause 25 in Form H of the Housing Developers (Control and Licensing) Regulations 1998, which was incorporated in the agreement, clearly stipulates that the damages be at 10%pa on the amount of purchase price paid to date by the purchaser to the vendor. The tribunal was merely awarding what had been stipulated by law and what had been agreed was actually in conformity with the law. The parties had no choice for under r 11(1) of the regulations, it is mandatory for the agreement to be in the very format specified in it, which is Form H (see para 7).

(2) The Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, in relation to the s 75, distinguished between two classes of cases of contract. The first was where it is difficult for the court to assess the damages or cases where there is no known measure of damages employable but there is evidence of an inherent real loss and if the same is not too remote then the court would award substantial, not nominal damages though it should not exceed the sum named in the contractual provision. The second is where there is inherent actual loss or damage from the evidence or the nature of the claim and the damage for the actual loss is not too remote and could be assessed by settled rules (see para 9).

(3) Mr Kong's (and his family's) deprivation of the enjoyment of the common facilities by reason of the delay in the completion of the same was not one which was quantifiable or measurable and therefore he belonged to the first category of persons described in *Selva Kumar*'s case. In addition, the agreed rate for the liquidated ascertained damages followed that of the relevant Schedule under a subsidiary legislation enacted for this purpose. The application of the formula in cl 25(2) by the Tribunal was thus not erroneous (see para 11).

[Bahasa Malaysia summary

Tribunal untuk pembeli rumah mendakwa ('Tribunal') memutuskan bahawa pemaju kompleks pangsapuri bertanggungjawab untuk membayar pembeli bagi sebuah unit, Encik Kong, sejumlah RM10,514 mewakili ganti rugi yang ditetapkan lambat siap kemudahan awam kompleks. Klausa 25(1) perjanjian jual dan beli ('perjanjian') mensyaratkan bahawa kemudahan awam mesti disiapkan dalam masa 36 bulan dari tarikh perjanjian tersebut dan bahawa kegagalan berbuat sedemikian, di bawah klausa 25(2), pemaju mesti membayar ganti rugi yang ditetapkan pada kadar 10% setahun atas jumlah harga belian yang dibayar terkini oleh pembeli kepada penjual. Pemaju

berhujah bahawa award yang dibuat adalah salah memandangkan tidak terdapat bukti ganti rugi seperti yang dikehendaki oleh s 75 Akta Kontrak 1950. Pemaju oleh itu memohon untuk perintah certiorari untuk membatalkan keputusan tribunal.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

(1) Klausa 25 dalam Borang H Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1998, yang telah dimasukkan ke dalam perjanjian, jelas mensyaratkan bahawa ganti rugi adalah pada 10% setahun atas jumlah harga belian yang dibayar terkini oleh pembeli kepada penjual. Tribunal hanya mengawardkan apa yang telah disyaratkan oleh undang-undang dan apa yang telah dipersetujui sebenarnya selaras dengan undang-undang. Pihak-pihak tidak mempunyai pilihan kerana di bawah peraturan 11(1) Peraturan-Peraturan, adalah mandatori untuk perjanjian berada dalam format yang ditetapkan di dalamnya, yang merupakan Borang H (lihat perenggan 7).

(2) Mahkamah Persekutuan di dalam kes *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, berkaitan s 75, membezakan antara dua kelas kes-kes kontrak. Pertama adalah di mana ia adalah sukar bagi mahkamah untuk menilai ganti rugi atau kes-kes di mana tidak terdapat sukatan yang diketahui mengenai ganti rugi yang digunakan tetapi terdapat keterangan kerugian sebenar yang wujud dan jika ianya tidak di luar dugaan oleh itu mahkamah akan mengawardkan ganti rugi substansial dan bukan nominal tetapi ia tidak patut melebihi jumlah yang dinyatakan di dalam peruntukan kontrak. Keduanya adalah di mana terdapat kerugian sebenar yang wujud atau ganti rugi daripada keterangan atau sifat tuntutan dan ganti rugi untuk kerugian sebenar bukan di luar dugaan dan boleh dinilai oleh undang-undang nyata (lihat perenggan 9).

(3) Penafian hak Encik Kong (dan keluarganya) terhadap kemudahan awam atas sebab kelewatan dalam menyiapkannya bukan satu yang boleh diukur atau disukat dan oleh itu dia tergolong dalam kategori pertama orang yang dijelaskan dalam Selva Kumar. Selanjutnya, kadar yang dipersetujui untuk ganti rugi yang ditetapkan mengikut Jadual yang relevan di bawah undang-undang subsidiari yang digubal bagi tujuan ini. Penggunaan formula dalam klausa 25(2) oleh tribunal oleh itu tidak salah (lihat perenggan 11).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 436–716.

For cases on certiorari, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5326–5330.
For cases on damages for late delivery, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3368–3375.
For cases on delay of completion, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6258–6265.

Cases referred to

Civil Service Unions & Ors v Minister of Civil Service [1985] AC 374 (refd)
Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445, FC (refd)
Petroleum Nasional Bhd v Nik Ramli Nik Hassan [2003] 4 CLJ 625, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Sakinas Sdn Bhd v Siew Yik Hau & Anor [2002] 5 MLJ 497; [2002] 3 CLJ 275, HC (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)
Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)

Legislation referred to

Contracts Act 1950 s 75
Housing Development (Control and Licensing) Act 1966 cl 27(2)
Housing Developers (Control and Licensing) Ordinance 1993 s 17Q(1)
Housing Developers (Control and Licensing) Regulations 1998 r 11(1), Schedule, Form H

Paul Tang (Tan, Yap & Tang) for the applicant.
Mcwillyn Jiok (State Legal Adviser, State Attorney Chambers) for the first respondent.
Emeric Teo Yaw Jeen (CH Tay & Partners) for the second respondent.

Rhodzariah Bujang J:

RULING

[1] The tribunal for housing purchaser claims ('the tribunal') had, on 16 April, 2013 adjudged that the developer of a condominium complex known as Sky Villa liable to pay a purchaser of one unit, a Mr Kong Yew Tek, a sum of RM10,514 representing the liquidated ascertained damages for the late completion of the common facilities of the complex. The common facilities are specified in the second schedule to the sale and purchase agreement and they include a swimming pool, BBQ pit, tennis court and a gymnasium. Clause 25(1) of the said agreement stipulates that the common facilities must be completed within thirty six months from the date of the said agreement (which

was 10 April, 2008) and that for failure to do so, under cl 25 (2), the developer must pay 'liquidated damages to be calculated from day to day at the rate of 10%pa on the amount of purchase price paid to date by the purchaser to the vendor'. The purchase price paid was RM243,368. The tribunal found the delay to be 166 days and came up with the sum adjudged based on the formula as stated above.

[2] The developer contended that the award made was wrong as there was no proof of damage as required by s 75 of the Contracts Act 1950. They had filed this application for an order of certiorari to quash the decision of the tribunal and for which leave to do so was granted by me earlier.

[3] The principle governing the grant of an order for certiorari has been enunciated by two Federal Court decisions, the later one endorsing that pronounced in the earlier decision. The earlier case is of course the celebrated case of *R Rama Chandran v the Industrial Court of Malaysia* [1997] 1 MLJ 145 and the other, that of *Petroleum Nasional Bhd v Nik Ramli Nik Hassan* [2003] 4 CLJ 625. Basically, from these authorities, the High Court's power to issue an order of certiorari which I have paraphrased to fit this case is grounded upon the following accepted three grounds:

(a) procedural impropriety pertaining to the decision making process of the tribunal;

(b) illegality of the decision of the tribunal; and

(c) irrationality of the decision of the tribunal.

[4] Edgar Joseph Jr FCJ in *Rama Chandran*'s case alluded to the possibility of a fourth ground, ie proportionally which, by the way, is an established ground for judicial review in England now although at the time of *Rama Chandran*'s decision, it was a mere possibility mentioned by Lord Diplock in *Council of Civil Service Unions & Ors v Minister of Civil Service* [1985] AC 374.

[5] The developer's counsel, Mr Paul Tang submitted that the award of the tribunal is to be impugned on all the above grounds with the exception of the last and fourth ground. He submitted that without proof that Mr Kong Yew Tack suffered any losses the award is illegal and irrational because s 75 of the Contracts Act 1950 specifically requires proof of such losses before the award can be made and by not addressing its mind to the said requirement of s 75, the tribunal has committed an error of law on the face of the record. He relied on the Federal Court decision of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 in support of his proposition on the requirement of s 75.

[6] In support of the ground on procedural impropriety, Mr Paul Tang raises these three contentions: A

(a) the tribunal acted outside of its jurisdiction in not addressing its mind to the fact that Mr Kong Yew Tack did not suffer actual loss or damages;

(b) the tribunal's refusal to allow the developer to be represented by counsel to address the alleged complex issues regarding the applicability of s 75; and B

(c) the tribunal's refusal to refer the said complex issue to the High Court under s 17Q(1) of the Housing Developers (Control and Licensing) Ordinance 1993. C

[7] In addition, Mr Paul Tang submitted that the applicable legislation on this matter in West Malaysia which is the Housing Development (Control and Licensing) Act 1966 and the schedule thereof gave a different and according to him, a more reasonable formula for ascertaining damages for late delivery of the common facilities such as in cl 27 (2) in this instant case. The formula in the said schedule is '… 10%pa of the *last* 20% of the purchase price' (Emphasis added.), as opposed to the 10% of 'the purchase price paid to date' in the same Schedule of the equivalent legislation for Sarawak, the Housing Developers (Control and Licensing) Regulations 1998. Reasonable or not, no one can argue that the West Malaysian formula translates to a much lower damages for the house developers there compared to here. The telling advantage for the developers there, on its own, however, cannot be a ground to allow this application for the obvious reason that the applicable law is different than what we have here in Sarawak. I reiterate that cl 25 in Form H of our Housing Developers (Control and Licensing) Regulations 1998, which was incorporated in the sale and purchase agreement in this case clearly stipulates that the said damages be at '*10%pa on the amount of purchase price paid to date by the purchaser to the vendor*'. The tribunal was merely awarding what had been stipulated by law and what have been agreed was actually in conformity with the law; nothing more or less. What is even clearer, the parties here have no choice for under r 11(1) of our Regulations, it is mandatory for the sale and purchase agreement to be in the very format specified in it, which is Form H. The said r 11(1) reads: D E F G H

Contract of sale

11(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in Form G in the Schedule and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in Form H in the Schedule." I

Section 75.

This section reads as follows:

> 75 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[8] On the contention that the damages awarded was not in conformity with s 75, with respect, I am unable to accede to the same. Mr Emeric Teo, for Mr Kong Yew Tack has referred me to the decision of the Court of Appeal in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852 where the Court of Appeal relied on a similar clause on liquidated ascertained damages for delay in the completion and/or delivery of the landed property as a complete answer to the appellant's ground of appeal that the respondents have failed in their duty to prove actual damage. Granted that the Court of Appeal did not in this cited case referred to *Selva Kumar*'s case, but with respect, Mr Paul Tang's reliance on *Selva Kumar*'s case is off the mark. Mr Emeric Teo has pointed out to me in his written submission, there is more to that case than just using it to support the proposition that there must be actual proof of damages in all cases where parties have agreed on the amount of liquidated damages to be imposed in their contract.

[9] What the Federal Court in the said case actually did was, in relation to the said s 75 to distinguish between two classes of cases of contract. The first was where it is difficult for the court to assess the damages or cases where there is no known measure of damages employable but there is evidence of an inherent real loss and if the same is not too remote then the court would award substantial, not nominal damages though it should not exceed the sum named in the contractual provision. The second is where there is inherent actual loss or damage from the evidence or 'the nature of the claim and the damage for the actual loss is not too remote and could be assessed by settled rules … ' the Federal Court held that it is with regards to this second category of cases that the failure to prove actual loss would cause the court to refuse to grant any damages. The clause on s 75 in the sale and purchase agreement in this cited case provides that if the appellant defaulted, all the money that he had paid up to the date of the breach (which was RM96,000) would be the agreed liquidated damages. The Federal Court went on to say that the evidence in the said case shows that actual loss is quantifiable since it was a sale of a clinic by the respondent to the appellant and that the actual loss of the appellant could be ' … assessed by settled rules. The purchaser, eg was using the medical equipment'.

[10] The decision in *Selva Kumar*'s case, it must be noted, was endorsed in

another Federal Court decision of *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445.

[11] In my view, Mr Kong Yew Tack's (and his family's) deprivation of the enjoyment of the common facilities by reason of the delay in the completion of the same was not one which was quantifiable or measurable and therefore he belonged to the first category of persons described in *Selva Kumar*'s case. In addition, as I have mentioned earlier, the agreed rate for the liquidated ascertained damages follows that of the relevant Schedule under a subsidiary legislation enacted for this purpose. Abdul Aziz Mohamad J in *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 497; [2002] 3 CLJ 275 considered a similar contractual provision based on the schedule of the West Malaysian Act and opined that the court ought to take cognizance that the set formula for determining the same was arrived at by the minister upon proper advice, having taken into account and balancing the interest of house buyers and housing developers.

[12] I share His Lordship's view and say that the agreed compensation must therefore be reasonable as it is within the ambit of a written law. The fact that the schedule of the West Malaysian Act provides a more favourable formula to housing developers than ours is not a reason for me to quash the decision of the tribunal. It is not open to the tribunal or me to choose which formula to apply for the solution lies with the legislature and not the court. It is just too bad for the applicant that the property is here and the formula in the Schedule of our Sarawak Regulations had to be incorporated in the sale and purchase agreement. Thus, I would conclude that the application of the formula in cl 25(2) by the tribunal was not erroneous on all the grounds raised as alleged. For these reasons, I dismiss the application and I do so with cost of RM5,000 in the absence of an agreement on it by counsel.

Application dismissed with costs of RM5,000.

Reported by Kanesh Sundrum